Supreme Court, U.S.
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NO. 991192

In The

SUPREME COURT OF THE UNITED STATES

BOBBY WAYNE BULLOCK,

*Petitioner*

v.

STATE OF TEXAS,

*Respondent*

*On Petition for Writ of Certiorari to the Texas Court of Appeals, First Judicial District*

# PETITION FOR WRIT OF CERTIORARI

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39 pp

## QUESTION PRESENTED

This petition presents the following questions:

1. Whether the Confrontation Clause requires the exclusion of a confession made by a non-testifying accomplice when that confession inculpates the accused.

2. Whether the Texas Court of Appeals erred, in holding that the admission of the accomplice's hearsay statement did not violate the confrontation clause, contrary to this Honorable Court's holding in *Lilly v. Virginia.*[1]

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1 ___U.S.___ , 119 S.Ct. 1887, ___ L.Ed.2d ___ (1999)

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court.

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## OPINIONS BELOW

The opinion of the Texas Court of Appeals for the First Judicial District is reported at *Bullock v. State*, 982 S.W.2d 579 (Tex.App. - Houston [1ST Dist.] 1998, pet. ref'd.)

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## STATEMENT OF JURISDICTION

The judgment of the Texas Court of Appeals for the First Judicial District was issued on November 19, 1998. A petition for discretionary review was timely filed with the Texas Court of Criminal Appeals. This petition was denied on August 23, 1999. A Motion for Rehearing was timely filed with the Texas court of Criminal Appeals. This motion was denied on October 20, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257

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## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part "... the accused shall enjoy the right ... to be confronted with the witnesses against him..."

## STATEMENT OF THE CASE

The fundamental question in the case is whether the lower courts properly interpreted the confrontation clause in

light of the Court's holding in *Lilly v. Virginia*, ___ U.S. ___, 119 S.Ct. 1887, ___ L.Ed.2d ___ (1999). The facts required to resolve this question in the petitioner's case are short and concise.

The petitioner was charged with possession with intent to deliver a controlled substance. At trial the State of Texas called an accomplice, Daniel Lindsey, to testify. The accomplice refused. The State of Texas, over counsel's objection, then introduced two confessions made by the accomplice that inculpated the petitioner. Specifically, Lindsey's statements identified petitioner as the person who delivered to Lindsey the two kilograms of cocaine found in Lindsey's automobile.

At trial and on appeal, the petitioner raised the federal question that the admission of the confessions violated his right to confront the witness. The Texas Court of Appeals for the First Supreme Judicial District held that the petitioner's right to confront the witness had not been violated. Petitioner again raised the federal question with the Texas Court of Criminal Appeals in his Petition for Discretionary Review.

## REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE TEXAS COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE PRECEDENT OF THIS COURT REGARDING THE EXCLUSION OF CONFESSIONS MADE BY A NON-TESTIFYING ACCOMPLICE WHEN THAT CONFESSION INCULPATES THE ACCUSED.

The petition for certiorari should be granted because the opinion below conflicts with this Court's recent ruling in *Lilly v. Virginia*, ___ U.S. ___, 119 S.Ct. 1887, ___ L.E.2d ___ (1999). It should be noted that the opinion of the Texas Court of Appeals was rendered prior to the issuance of the opinion in *Lilly*; however, the Texas Court of Criminal Appeals was made aware of the *Lilly* opinion in a supplemental petition for discretionary review. (See Appendix, p. A-22). Even after being made aware of *Lilly* the Texas Court of Criminal Appeals refused to grant relief.

In its opinion the Texas Court of Appeals held that the hearsay statements of the non-testifying accomplice did not violate the confrontation clause because by falling under a traditional hearsay rule exception (statement against penal interest), the reliability of the statements could be presumed. *Bullock v. State*, 982 S.W.2d 579, 582-583 (Tex. App. - Houston [1$^{ST}$ Dist.] 1998, pet. ref'd.) The Court of Appeals

further concluded that the statements were shown to be sufficiently reliable due to their corroboration by other evidence presented at trial. *Id.*

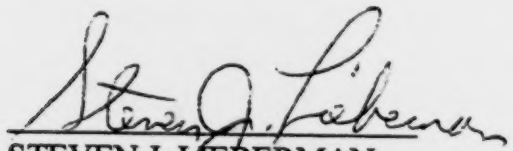
Both of the lines of reasoning used by the Texas Court of Appeals were rejected by this Court in *Lilly*. This court stated "[t]hat accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly*, 119 S.Ct. at 1899. This Court also state that "[t]o be admissible under the Confrontation Clause ... Hearsay evidence used to convict a defendant must possess indiccia of reliability by virtue of it's inherent trustworthiness, not by reference to other evidence at trial." *Lilly*, 119 S.Ct at 1901 citing *Idaho v. Wright*, 497 U.S.805, 110 S.Ct. 3139, 111 L.E.2d 638 (1990). Based on the precedent of this Honorable Court, the Texas Court of Appeals reached an erroneous conclusion regarding the admissibility of the accomplice's confessions in the petitioner's case. Accordingly, review on Writ of Certiorari is mandated by United States Supreme Court Rule, 10(c).

## CONCLUSION

The Texas Court of Appeals, First Judicial District, had rendered an Opinion which directly conflicts with the decision of *Lilly v. Virginia* on the identical issue of whether an accomplice's hearsay statement violated the Sixth Amendment's Confrontation Clause. The Texas Court of Criminal Appeals sanctioned this action by refusing to consider the propriety of the lower court of appeals ruling in light of *Lilly*, despite being requested to do so by Petitioner's Supplemental Pleading.

WHEREFORE, it respectfully is prayed that a Writ of Certiorari be granted to review the judgment and opinion of the Texas Court of Appeals for the First District of Texas; the judgment of the Court of Appeals be reversed, and the cause remanded for a new trial.

Respectfully submitted,



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**IN THE**
**COURT OF APPEALS**
**FOR THE**
**FIRST DISTRICT OF TEXAS**

**OPINION ISSUED NOVEMBER 19, 1998**

NO. 01-95-01490-CR

BOBBY WAYNE BULLOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 697877

## MAJORITY OPINION

The jury found appellant, Bobby Wayne Bullock, guilty of possession with intent to deliver at least 400 grams of cocaine. The jury also found that appellant had exhibited or used a deadly weapon in the commission of the offense. Appellant pleaded true to two enhancement allegations, and the jury assessed punishment at 60 years in prison. We address: (1) the admissibility of a co-defendant's written statements that appellant claims violated his rights to confrontation and cross-examination because of their unreliability and lack of corroborating circumstances indicating trustworthiness; and (2) the sufficiency of the

evidence to support the jury's finding that appellant used a deadly weapon where the charge instructed the jury to limit its consideration of extraneous offense evidence only to appellant's guilt or innocence. We affirm.

**Facts**

On March 1, 1995, at around 8:30 p.m., Houston police found Mario Hurtado's corpse in a store parking lot.

On March 2, 1995, a Department of Public Safety trooper stopped a car for speeding. He arrested the passenger, Daniel Lindsey, pursuant to an outstanding warrant and obtained verbal consent to search the car. He found jewelry in the console that appeared to have blood on it. He also found two bundles of cocaine behind the back seat, and a few grams of cocaine in an overnight bag. Lindsey ultimately took responsibility for all of the cocaine.

> On March 3, 1995, Lindsey gave a written statement that read, in part:
>
> On 3-1-95, at approximately 8:30 p.m., I was at the residence of Johnny and Linda Morgan in Oklahoma City, Oklahoma. Bullock and I had made arrangements with Mario Hurtado to purchase ten kilos of Cocaine. Bullock called me on my mobile phone at Johnny's house and said that Mario was with Bullock and that everything was okay. Bullock then handed the phone to Mario. I talked to Mario, who told me that everything was just fine and that they would have the 10 kilos soon and that they would be shipping them to me. Everything went down hill from there.

Mario handed the telephone back to Bobby who told me that he would call me back in a little bit and that everything was fine and that he would call me later.

About 9:30 p.m., I received a second call from Bobby. Bobby said that the guy was there with the stuff in Bobby's Jeep. I was listening to Bobby talking to Mario. Mario says, "You have some money for me?" Bobby said, "Man, where's the rest?" Mario gave him some sh-- about, "That's all there is." Then there was the sound of scuffling. Then I heard Mario say, "You die or me die, mother f----r, fight now." That's what he said. I heard a bunch of scuffling and some noises like slapping and being hit. It kind of went still for a minute. Then I heard three shots. I heard the sound of doors flying open, and then I guess that's when Bobby hung up the phone. A few minutes later, Bobby called me back. Bobby said, "Dan, they got me." I said, "What the f--- happened? Did they shoot you?" Bobby said, "I don't know." I asked him, "Didn't you have someone there with him?" He said, "No, I thought I could handle it myself. It wasn't supposed to happen like this." He started telling about everything that happened. He said that besides Mario, there were three Columbians [sic] in the Jeep with him. I asked him, "What the f--- for.'" Bobby said, "That's just the way it had to go down." He said that they had tried to get him, but that he got Mario instead. Bobby said that when he pulled the

gun on them, they freaked and jumped him. He goes, "Man. I'm all f---ed up." Bobby said, "We scuffled, and Mario took my gun from me. My gun jammed on Mario. Mario hit me at least three times with the gun." After they stopped hitting me, they tried to un-jam my gun. That's when Bobby said he reached down, got his second gun and then Bobby said, "I at least got Mario right between the eyes. I might have got one of the others also."

I asked Bobby what he did with the body. He said he dumped it at some apartments ....

I got my clothes together and Johnny Morgan and I left Oklahoma City in my car about 10 o'clock. I asked Johnny to drive me ....

Bobby was asleep and was the only one there. I woke Bobby up and talked to Bobby. I asked him how he was. He showed me the cuts and stuff. He didn't want to talk much about it. That's when he told me there was only two kilos instead of ten. Bobby said that Mario had evidently intended on killing him. I told him that that's what it sounded like to me.

During the time I was at Chuck's trailer talking to Bobby, I went over to Bobby's house to get him some clothes. While I was there I looked at his Jeep and saw that blood was everywhere, the windows, seat, dash, headliner.

Bobby told me that he was going to burn his

> clothes, his jeep, and that he was .going to get rid of the pistol. Bobby asked me to take his jewelry to Oklahoma and keep it for him until he decided what to do with it. He told me to clean it up, because it probably still had blood on it. I told him that I would take it and keep it for him.
>
> Bobby gave me two kilos that he had ....
>
> Johnny and I left. I fell asleep. Johnny later woke me up and said, "Oh, sh--. What did I do."? We're being stopped"·

Based upon information in Lindsey's statement, the San Jacinto County Sheriffs Department arrested appellant and confiscated a Jeep. Houston police Officer Jose Selvera later found blood on the floorboard and under the seat of the Jeep, as well as a bullet hole in the roof.

Appellant gave Selvera a written statement admitting he intended to meet with Hurtado on March 1, 1995, to purchase 10 kilograms of cocaine and work out a payment plan for the four kilograms that Johnny Morgan had stolen. He claimed he did not take any money with him because he was going to ask Hurtado to allow him to pay for the cocaine later. He said he and Hurtado drove appellant's Jeep to meet three Colombians, who gave Hurtado two kilograms of cocaine. When Hurtado learned appellant did not have $160,000 for the 10 kilograms he promised to buy, he pulled a gun. Appellant pulled a gun, as well, but Hurtado knocked it out of his hand. As they struggled, Hurtado's gun fired into the back seat and then jammed. Hurtado lay on top of appellant, trying to un-jam the gun. Appellant found his gun, fired three times from a prone position, believing he had hit

Hurtado in the face. He drove the Jeep away and dumped Hurtado's body. Appellant said he then called Lindsey, who was in Oklahoma. The next morning Lindsey arrived and appellant gave him the cocaine and jewelry.

Lindsey pleaded guilty to the possession charge on August 7, 1995, received a 10-year prison sentence, and did not file a notice of appeal. On August 18, 1995, Lindsey gave an additional statement that said appellant gave him two kilograms of cocaine. Lindsey also stated that appellant told him he got the cocaine from Hurtado on March 1, 1995. Lindsey said he took the two kilograms on March 2, 1995, in Shepherd, Texas, and was returning to Oklahoma when Trooper Turner pulled him over.

At appellant's trial, the judge held a hearing outside the presence of the jury and determined Lindsey had no Fifth Amendment right to refuse to testify. Nevertheless, Lindsey refused to testify, and the judge held him in contempt. The court allowed the State to introduce Lindsey's statements into evidence over appellant's objection.

Before accepting appellant's plea, the court informed him that he could appeal only the motion to suppress without the court's permission. Appellant stated that he understood the court's explanation of his appellate remedies and proceeded with his plea.

**Admissibility of Lindsey's Statements**

In his first four points of error, appellant claims the court erred by admitting Lindsey's written statements into evidence. Appellant presents two challenges: (1) violation of the right to confront and cross-examine the declarant because of the unreliability of the statements; and (2) error in

admitting statements against penal interest that were not corroborated by circumstances indicating trustworthiness. [2]

**A. Violation of Confrontation and Cross-examination**

Admission of a hearsay statement does not violate the confrontation clause where the declarant is unavailable for trial cross-examination and the statement bears adequate indicia of reliability. *Ohio v. Roberts,* 448 U.S. 56, 68, 100 S. Ct. 2531, 2539 (1980). Appellant concedes Lindsey was unavailable, but contests reliability.

We can usually presume reliability when the declarant's statement falls under a traditional hearsay rule exception. *See id.* 448 U.S. at 68, 100 S. Ct. at 2539. However, a statement against the declarant's penal interest is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. TEX. R. CRIM. EVID. 803(24). A co-defendant's statement against penal interest is presumed unreliable, however, to the extent it inculpates a defendant. *See Lee v. Illinois,* 476 U.S. 530, 546, 106 S. Ct. 2056, 2065 (1986). The rationale for this proposition is the obvious motive of an accomplice to shift some or all of the blame away from himself. *See id.* 476 U.S.

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2 Nowhere at trial, or on appeal, has appellant argued inadmissibility of the statements against penal interest because they contained statements inculpating appellant rather than only the declarant. Appellant did not preserve at trial, nor argue on appeal, the error which the dissenting opinion addresses. Furthermore, the dissenting opinion acknowledges that Lindsey's statements were only partially inadmissible. Under these circumstances, the burden is on the objecting party to specify the objectionable portions. *See Wintters v. State,* 616 S.W. 2d 197, 202 (Tex. Crim. App. 1981). Appellant did not do so.

at 545, 106 S. Ct. at 2064.

Appellant acknowledges that reliability is shown when a defendant's own statement confirms the essential facts of a co-defendant's statement. *See Cruz v. New York,* 481 U.S. 186, 192-93, 107 S. Ct. 1714, 1718-19 (1987). Appellant claims there are discrepancies between appellant's confession and Lindsey's statements because: (1) Lindsey stated he and appellant had been engaged in distributing cocaine since February 1994, but appellant made no such admission; and (2) Lindsey's statements leave doubt whether appellant shot Hurtado in self-defense, while appellant clearly stated Hurtado had tried to kill him.

The State argues that appellant's and Lindsey's statements give virtually identical accounts of the facts of the offense: (1) they had an arrangement to buy 10 kilograms of cocaine from Hurtado; (2) only two kilograms were actually delivered; (3) the deal went bad; (4) a struggle ensued; (5) appellant shot Hurtado and dumped his body in another location; and (6) appellant gave Lindsey the two kilograms of cocaine he received from Hurtado. The State contends this is sufficient corroboration by itself. Nevertheless, the State points out other facts supporting the trustworthiness of Lindsey's statements: (1) blood inside, and a bullet hole in the roof, of appellant's Jeep corroborated Lindsey's statement that Hurtado was shot there; (2) Hurtado's body was found under circumstances indicating it had been dumped at that location, as Lindsey's statement said; (3) at' the time of appellant's arrest, he had scratches on his body, corroborating Lindsey's statement appellant had been in a scuffle; and (4) the weight of the bundles of cocaine discovered in appellant's vehicle was 1.93 kilograms, corroborating Lindsey's statement he received two kilograms of cocaine from appellant the same morning.

We conclude that appellant's alleged "discrepancies" do not undermine the abundant corroboration from appellant's own confession and independent circumstantial evidence. Lindsey's statements were shown to be sufficiently reliable.

**B. Uncorroborated and Untrustworthy**

Appellant's only argument that Lindsey's statements should have been excluded by the hearsay rule is that the statements were insufficiently corroborated by circumstances that indicate the statements' trustworthiness. We have already concluded to the contrary.

Accordingly, we overrule appellant's first four points of error.

**Sufficiency of the Evidence**

Appellant's fifth point of error challenges the sufficiency of the evidence supporting the jury's finding that a deadly weapon was used or exhibited where the court's charge restricted to appellant's guilt or innocence of the alleged offense the jury's consideration of any evidence regarding a weapon.

Appellant's argument is based on a line of cases holding that sufficiency of the evidence must be judged by the jury charge. *See Benson v. State,* 661 S.W.2d 708 (Tex. Crim. App. 1982). The *Benson* line of cases was overruled in *Malik v. State.* 953 S.W.2d 234, 239 (Tex. Crim. App. 1997).

Accordingly, we overrule appellant's fifth point of error because its basis has been abolished.

## Conclusion

We affirm the judgment of the trial court.

Michael H. Schneider
Chief Justice

Panel consists of Chief Justice Schneider and Justices Andell and Taft.
Justice Andell dissents and Justice Taft concurs.
Publish. TEX. R. APP. P. 47.

**IN THE**
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**FIRST DISTRICT OF TEXAS**

**OPINION ISSUED NOVEMBER 19, 1998**

NO. 01-95-01490-CR

BOBBY WAYNE BULLOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 697877

## DISSENTING OPINION

I agree with the majority opinion that appellant did not object at trial, or argue on appeal, that Lindsey's statements inculpating appellant did not qualify as statements against interest because they were not against Lindsey's penal interest. Nevertheless, appellant did argue that Lindsey's statements were not reliable. I would hold that unreliability is the foundation for the whole line of cases establishing that statements of co-defendants are inadmissible as to those portions inculpating a defendant. Accordingly, appellant adequately preserved error that I would hold is reversible. I respectfully dissent from the majority's opinion apparently holding appellant waived his error by not more specifically articulating the manner in which Lindsey's statements

regarding appellant were unreliable.

**Statement Against Penal Interest**

We can usually presume reliability where the declarant's statement falls under a traditional hearsay rule exception. *See Ohio v. Roberts,* 448 U.S. 56, 68, 100 S. Ct. 2531, *2539* (1980). However, a statement against the declarant's penal interest is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. TEX. R. CRIM. EVID. 803(24). Rule 803(24) does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. *Miles v. State,* 918 S.W.2d 511,515 (Tex. Crim. App. *1996)* (quoting *Williamson v. United States,* 114 S. Ct. 2431, 2435 (1994)); *Cofield v. State,* 891 S.W.2d 952, 956 (Tex. Crim. App. 1994).

The fact that a person is making a broadly self-inculpatory confession does not make the confession's non-self-inculpatory parts more credible. *Williamson,* 114 S. Ct. at 2435. However, the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than mere attempts to shift blame or curry favor with the authorities. *See id.* at 2436. Whether a statement is self-inculpatory can only be determined by viewing it in context. *Lee v. Illinois,* 476 U.S. 530, *545,* 106 S. Ct. 2056, 2064 (1986). A defendant's confession is presumptively unreliable as to those portions which detail a co-defendant's conduct or culpability because those portions may be the result of the defendant's desire to shift the blame, curry favor, avenge himself, or divert attention to another. *Lee,* 476 U.S. at 545, 106 S. Ct. at 2064; *Cofield,* 891 S.W.2d at 956. A co-defendant's statements about what the defendant did or said

are less credible than ordinary hearsay evidence. *Lee,* 470 U.S. at 541,106 S. Ct. at 2062. Furthermore, a co-defendant's confession is not necessarily made reliable in its entirety simply because some of the facts it contains "interlock" with the facts in the defendant's statement. *Lee,* 470 U.S. at 545, 106 S. Ct. at 2064. The true danger inherent in such hearsay is its selective reliability. *Id.*

I cannot conclude that all of what Lindsey said was properly admitted. *See Williamson,* 114 S. Ct. at 2437. Lindsey's statement is reliable only to the extent that he admitted knowingly possessing cocaine. *See id.* But other aspects of his confession, especially the portions implicating appellant as his source and detailing appellant's struggle with Hurtado, did little to subject Lindsey to criminal liability. *See id.* In fact, he may have been trying to curry favor with the police and district attorney to earn a lighter sentence and avoid other charges.

I would find the court erred by admitting both of Lindsey's statements in their entirety. The non-self-exculpatory portions do not fall within the statements against interest exception and, as such, do not bear adequate safeguards of reliability.

**Harm**

The error in this case involves the denial of appellant's constitutional rights to confrontation and cross-examination. Therefore, unless it can be determined beyond a reasonable doubt that the error did not contribute to the conviction or to the punishment, we must reverse the judgment. TEX. R. APP. P. 44.2(a).

Had Lindsey's statements properly been excluded, the

only evidence that appellant possessed cocaine would have been his own extra-judicial confession. A criminal defendant's conviction may not be based solely on that defendant's extra-judicial confession, and if such confession is obtained, there must be some independent evidence of the corpus delicti of the crime. *Brady v. State,* 32 Tex. Crim. 264, 22 S.W.924, 925 (1893).

Had the court excluded Lindsey's statement, the only evidence linking appellant to cocaine possession would have been his own extra-judicial confession. Such evidence would have been legally insufficient to support a verdict. Therefore, I would find the erroneous admission of the statements harmful by allowing conviction where the evidence was otherwise legally insufficient.

I would sustain appellant's first four points of error, and reverse and remand for a new trial.

Eric Andell
Justice

Panel consists of Chief Justice Schneider and Justices Andell and Taft.
Publish. TEX. K. APP. P. 47.

**IN THE**
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**OPINION ISSUED NOVEMBER 19, 1998**

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BOBBY WAYNE BULLOCK, Appellant

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THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 697877

## CONCURRING OPINION

I agree with the majority opinion. I write because there is a reason, yet unaddressed, why the basis for the dissenting opinion should be reconsidered.

### Statements Against Penal Interest

We recently addressed the issue of admissibility of a non-testifying co-defendant's confession as a declaration against penal interest in *Zarychta v. State*, 961 S.W.2d *455* (Tex. App.--Houston [lst Dist.] 1997, pet. ref'd). We observed that the Court of Criminal Appeals has adopted the United States

Supreme Court's view of the federal counterpart to rule 803(24) based on the respective rules containing very similar language. *Zarychta* 961
S.W.2d at 458 (citing *Cofield v. State,* 891 S.W.2d 952, 956 (Tex. Crim. App. 1994)). Unnoticed in *Cofield* and its progeny, including Zary*chta,* are the differences in language between the federal and state rules of evidence concerning statements against penal interest.

The federal counterpart is located within rule 804 of the Federal Rules of Evidence, which concerns hearsay objections where declarant is unavailable:

> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. RULE EVID. 804(b)(3). The Texas version is found in rule 803 of the Texas Rules of Criminal Evidence dealing with hearsay exceptions applicable regardless of the

availability of the declarant:

> **(24) Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object or hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

TEX. R. CRIM. EVID. 803(24).

The differences between the federal and Texas versions are: (1) the federal version requires the declarant to be unavailable, while Texas does not; (2) Texas includes statements that would make one an object or hatred, ridicule, or disgrace, while the federal version does not; and (3) Texas requires all statements against penal interest to be corroborated by circumstances clearly indicating trustworthiness, while the federal version requires only statements offered to exculpate the accused to be corroborated. The significance of these differences upon the issue here is that the federal version does not require corroboration of an unavailable co-defendant's statement against penal interest when offered by the government to

inculpate the defendant. It is possible that this lack of a corroboration requirement motivated the United States Supreme Court to strictly construe statements against penal interest as not including statements inculpating others in *Williamson v. United States,* 512 U.S. 594, 114 S. Ct. 2431 (1994).

Furthermore, there is a line of Texas cases upholding the admission of statements against penal interest made by co-defendants. *See McFarland v. State,* 845 S.W.2d 824, 835-37 (Tex. Crim. App. 1992); *Tidrow v. State,* 916 S.W.2d 623, 626-29 (Tex. App.--Fort Worth 1996, no pet.). Although the concurring opinion in *Miles v.* State, 918 S.W.2d 511, 518 n.2 (Tex. Crim. App. 1996) (Baird, J., concurring), urged that *McFarland* should be overruled, the Court of Criminal Appeals has not done so.

I would hold that we are not bound by the interpretation of the federal rule by the United States Supreme Court, based on the substantial differences in the respective evidentiary rules regarding statements against penal interest. Indeed, the approach of the United States Supreme Court in *Williamson* was to evaluate each statement within a confession as a separate statement for purposes of admissibility under the federal hearsay exception. *Id.* at 2434-35. This is antithetical to the general approach Texas has taken in evaluating admissibility of statements. *See, e.g., Marini v. State,* 593 S.W.2d 709, 713 (Tex. Crim. App. 1980) (holding that later declarations during defendant's confession leading officers to evidence of the crime constituted part of one continuous confession that began at the police station). The federal interpretation would lead to the practice of examining every sentence or independent clause for self-inculpation *and* corroboration to be admissible under the hearsay exception for statements against penal interest.

I would follow *McFarland* until expressly overruled by the Court of Criminal Appeals. Had appellant preserved the issue, I would hold Lindsey's statements admissible because they inculpated Lindsey and they are clearly trustworthy. As in *Tidrow,* Lindsey's statements are corroborated by appellant's own confession. *Tidrow,* 916 S.W.2d at 628. They are also corroborated by physical evidence, as in *McFarland. McFarland,* 845 S.W.2d at 836. This is not a case where the declarant sought to direct the blame at appellant in order to escape responsibility for his actions. To the contrary, Lindsey admitted his guilt for the charged offense and merely implicated appellant as a party.

Therefore, I urge the Court of Criminal Appeals to revisit this issue.

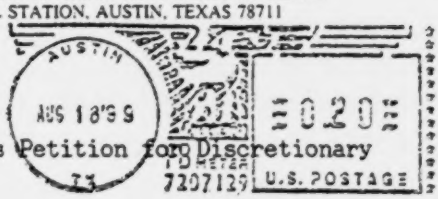
Tim Taft
Justice

Panel consists of Chief Justice Schneider and Justices Andell and Taft.
Publish. TEX. R. APP. P. 47.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

August 18, 1999
COA#: 01-95-01490-CR
RE: Case No. 0613-99
STYLE: BULLOCK, BOBBY WAYNE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

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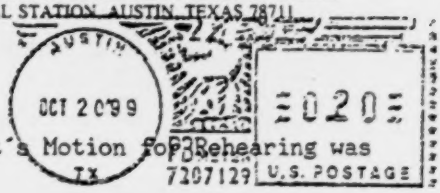
OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

October 20, 1999
COA#: 01-95-01490-CR
RE: Case No. 0613-99
STYLE: BULLOCK, BOBBY WAYNE

On this day the Appellant's Motion for Rehearing was denied.

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**CAUSE NO. 0613-99**

**TEXAS COURT OF CRIMINAL APPEALS**
**AUSTIN, TEXAS**

**BOBBY WAYNE BULLOCK,**
***Appellant***

**VS.**

**THE STATE OF TEXAS,**
***Appellee***

On Petition for Discretionary Review from
The First Court of Appeals
In No. 01-95-01490-CR Affirming the
Conviction in No. 697877 from the
232ND Judicial District Court
of Harris County, Texas

# SUPPLEMENTAL PETITION FOR DISCRETIONARY REVIEW

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## PRELIMINARY STATEMENT

Appellant Bobby Wayne Bullock, filed his Amended Petition for Discretionary Review in the Court of Appeals on March 9, 1999. On April 29, 1999, the Petition for Discretionary Review was received and filed by the Court of Criminal Appeals.

On June 10, 1999, the United States Supreme Court, rendered an opinion which directly addresses the grounds raised by Appellant, which are currently pending before this Court. Justice requires that Appellant file this Supplemental Petition for Discretionary Review. See Tex. R. App. P. 68.10.

## APPELLANT'S SECOND GROUND FOR REVIEW

(Restated)

THE COURT OF APPEALS ERRED IN HOLDING THAT THE ADMISSION OF THE CO-DEFENDANT'S HEARSAY STATEMENT DID NOT VIOLATE THE CONFRONTATION CLAUSE.

## SUPPLEMENTAL REASON FOR REVIEW

1. The Court of Appeals has decided an important question of federal Law which conflicts with the applicable decisions of the Supreme Court of the United States, namely, Lilly v. Virginia, No. 98-5881 (U.S. Sup.Ct. 6/10/99). See Tex. R. App. P. 66.3 (c).

## ARGUMENT AND AUTHORITIES

At trial the state called Appellant's co-defendant, Daniel Ray Lindsey, as a witness to testify against Appellant. Lindsey refused to testify invoking his rights under the Fifth Amendment.

The state offered Lindsey's out of court statements as

declarations against penal interest. The trial court admitted the statements over the objections of Appellant. The Court of Appeals held that the statements were not admitted in violation of the Confrontation Clause because they were admissible as an exception to the hearsay rule. See Tex. R. Crim. Evid. 803 (24).

In *Lilly v. Virginia*, *supra*; the Supreme Court recognized that the issue of whether statements fall within a hearsay exception for confrontation clause purposes is a federal question. The court ruled that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." The court concluded that the admission of the co-defendant's confession violated the defendant's Confrontation Clause rights.

The Court of Appeals has clearly decided an important question of federal law, which conflicts with the

applicable decisions of the Supreme Court of the United States. See Rule 66.3(c). Accordingly, this Honorable Court should grant this petition for discretionary review.

## PRAYER FOR RELIEF

For the foregoing reasons, Appellant prays that this Honorable Court grant Appellant's Petition for Discretionary Review. Following the grant of review, Appellant prays that the judgment of the Court of Appeals be reversed and the case remanded to the trial court for a new trial or order any other appropriate relief.

Respectfully submitted,

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Telephone: (713) 228-8500
Facsimile: (713) 228-0034

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was delivered via certified mail, return receipt requested, to Calvin Hartman, Harris County District Attorney's Office, Appellate Division, 201 Fannin, Suite 200, Houston, Texas 77002 and Matthew W. Paul, P.O. Box 12405, Austin, Texas 78711, on this the ____ day of July, 1999.

_____

Steven J. Lieberman

Supreme Court, U.S.
FILED
MAR 17 2000
CLERK

(2)

No. 99-1192

# In the Supreme Court of the United States

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BOBBY W. BULLOCK,
*Petitioner,*

v.

STATE OF TEXAS,
*Respondent.*

---

On Petition for Writ of Certiorari to the
Texas Court of Appeals

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## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Confrontation Clause requires the exclusion of a confession made by a non-testifying accomplice when that confession inculpates the accused.

2. Whether the Texas Court of Appeals erred in holding that the admission of the accomplice's hearsay statement did not violate the Confrontation Clause, contrary to the Court's holding in *Lilly v. Virginia*.

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No. 99-1192

# In the Supreme Court of the United States

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BOBBY W. BULLOCK,
*Petitioner,*

v.

STATE OF TEXAS,
*Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

Respondent State of Texas submits this brief in opposition to Bobby Bullock's petition for writ of certiorari. In his petition, Bullock asks the Court to review the decision of the First Court of Appeals at Houston, Texas, affirming his conviction for possession with intent to deliver at least 400 grams of cocaine.

Bullock complains that the admission into evidence of an unavailable accomplice's out-of-court confessions that inculpated Bullock for the offense of possession with intent to deliver violated his Sixth Amendment right to confront his accuser at trial through cross-examination in open court. Bullock asks this Court to assume jurisdiction over this matter and argues the court of appeals's decision conflicts with this

Court's decision in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999) (plurality opinion).

The Court should deny Bullock's petition because the court of appeals's decision does not conflict with *Lilly*. *Id.* Rather, the court of appeals properly applied this Court's established Confrontation Clause jurisprudence. Bullock has not alleged nor established any other basis to invoke the jurisdiction of this Court. *See* SUP. CT. R. 10(b), (c).

## STATEMENT OF THE CASE

On March 1, 1995, Houston police found the body of Mario Hurtado in a store parking lot. An investigation into the homicide ensued. IV RR. 264-67.

On March 2, 1995, Johnny Morgan was stopped by a Texas Department of Public Safety trooper for speeding while driving through Navarro County. IV RR. 111-12. Daniel Lindsey, the actual owner of the vehicle, was a passenger in the vehicle at the time. IV RR. 117. After performing a routine records check on Lindsey, the trooper arrested Lindsey pursuant to an outstanding warrant and obtained verbal consent to search the vehicle. IV RR. 118-19. The trooper found two bundles of cocaine. IV RR. 120. The trooper placed Morgan and Lindsey under arrest for aggravated possession of cocaine. IV RR. 123. Ultimately, Lindsey took responsibility for the cocaine, informing the police that Morgan had nothing to do with the cocaine, its purchase, or the eventual plan to sell it. IV RR. 158.

On March 3, 1995, Lindsey gave a written statement to the police wherein he confessed to being involved with Petitioner Bullock in the dealing of cocaine. IV RR. 157. Lindsey

stated that he and Bullock had an agreement to purchase ten kilograms of cocaine from Mario Hurtado on March 1, 1995. Lindsey stated that he was in Oklahoma City that night and that Bullock was to receive the cocaine from Hurtado. Problems arose, however, at the time of exchange as Hurtado apparently only came to the exchange with two kilograms of cocaine. A struggle ensued, and Bullock was badly beaten. However, he ultimately shot and killed Hurtado. Lindsey stated that Bullock dumped Hurtado's body in a store parking lot and then drove to a restaurant outside Houston to wait for help. Lindsey further stated that Johnny Morgan drove him to meet Bullock in Conroe, Texas that night. After Lindsey and Bullock spoke about the events of the evening, Bullock gave the two kilograms of cocaine to Lindsey to take back with him to Oklahoma. Bullock requested Lindsey wire him one to two thousand dollars upon his return to cover medical expenses. IV RR. 164-69.

Lindsey pleaded guilty to the possession charge on August 7, 1995, received a ten-year prison sentence, and did not file a notice of appeal. *Bullock v. State*, 982 S.W.2d 579, 581 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).[1]

On March 6, 1995, Bullock also gave a written statement to the police in which he admitted meeting with Mario Hurtado on March 1, 1995, to purchase ten kilograms of cocaine. He stated that he did not bring any money with him to the exchange, but rather planned to arrange a payment plan

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[1] The relevant portion of Lindsey's confession to the police is set forth in the court of appeals's opinion.

with Hurtado. Bullock stated that this angered Hurtado who then pulled out a gun and threatened to kill him. Hurtado and Bullock struggled, and Bullock eventually shot and killed Hurtado. Bullock stated he then drove to some business buildings and dumped Hurtado's body. Bullock further stated he called Lindsey after the shooting and told him he had the cocaine. Finally, Bullock stated that on the following day he gave the two kilograms of cocaine to Lindsey. IV RR. 289-93.

Although initially charged with the murder of Mario Hurtado, Bullock was not tried for that crime. Bullock was charged with and convicted of possession with intent to deliver at least 400 grams of cocaine. IV RR. 109-11. Included in the evidence admitted by the prosecution at trial were two out-of-court confessions by Daniel Lindsey and Bullock's own confession to the police. IV RR. 109, 288. Lindsey's statements were admitted over Bullock's objection after Lindsey asserted his Fifth Amendment privilege and refused to testify. IV RR. 109.

Bullock appealed his conviction to the court of appeals alleging, among other things, that his Sixth Amendment right to cross-examine his accuser was violated by the admission of Lindsey's out-of-court statements. The court of appeals affirmed the admission of the statements and held that Bullock's own statement mirrored Lindsey's statements, thus establishing their inherent reliability. *Bullock*, 982 S.W.2d at 582-83. Bullock then filed a petition for discretionary review with the Texas Court of Criminal Appeals, which denied review.

## ARGUMENT

### THE TEXAS COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT CONCERNING A CRIMINAL DEFENDANT'S RIGHT TO CONFRONT HIS ACCUSER.

Bullock attempts to convince the Court to review his conviction for possession of cocaine with intent to deliver by manufacturing a conflict between the court of appeals's decision and the decision of this Court in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999). Bullock argues his Sixth Amendment right to cross-examine his accuser was violated when the trial court admitted into evidence the statements of an unavailable accomplice, Daniel Lindsey, which were taken while Lindsey was in police custody and which inculpated Bullock. Pet. at 3-4.

Bullock's argument is fallacious because the court of appeals correctly applied this Court's Confrontation Clause jurisprudence as established in *Ohio v. Roberts,* 448 U.S. 56 (1980), *Lee v. Illinois*, 476 U.S. 530 (1986), and recently reaffirmed in *Lilly.* 119 S.Ct. at 1894. There exists no conflict between the court of appeals's decision and this Court's Confrontation Clause jurisprudence.

In *Roberts*, the Court summarized the general framework of the Confrontation Clause analysis: the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing through cross-

examination would be expected to add little, if anything, to the statements' reliability. *Roberts*, 448 U.S. at 66.

The Court in *Lee v. Illinois* dealt specifically with the out-of-court statements of criminal accomplices. In *Lee*, the Court rejected Illinois's argument that admitting the confession of a co-defendant in a joint trial for double murder fell within a firmly rooted exception to the hearsay rule, namely the declaration-against-penal-interest exception. *Lee*, 476 U.S. at 544. Referring to the declaration-against-penal-interest exception, the Court said, "that concept defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5.

Finally, in *Lilly v. Virginia*, a plurality of this Court decided that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly*, 119 S.Ct. at 1899. Such statements are presumed to be unreliable and inadmissible. *Id.* at 1900. Although the plurality expressed some doubt as to whether the presumption against admission of an accomplice's out-of-court statement could ever be rebutted, *id.*, it noted the Confrontation Clause does not impose a blanket ban on the state's use of nontestifying accomplice statements that incriminate a defendant. Rather, the Confrontation Clause simply requires the state to satisfy the second prong of the *Roberts* test in order to introduce such statements. *Id.* at 1899 n.5.

Bullock erroneously asserts in his petition that the court of appeals contravened this Court's decision in *Lilly* by holding that:

> hearsay statements of the non-testifying accomplice did not violate the confrontation clause because by falling under a traditional hearsay rule exception (statement against penal interest), the reliability of the statements could be presumed.

*See* Pet. at 3 (citations omitted). Further, Bullock wrongly contends that the court of appeals improperly relied on other evidence presented at trial to corroborate Lindsey's out-of-court statements regarding Bullock's involvement in the crime of possession with the intent to deliver. *Id.* at 4. The court of appeals properly applied this Court's Confrontation Clause jurisprudence. The court of appeals plainly stated:

> We can usually presume reliability when the declarant's statement falls under a traditional hearsay rule exception. However, a statement against the declarant's penal interest is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. *A co-defendant's statement against penal interest is presumed unreliable, however, to the extent it inculpates a defendant.*

*Bullock*, 982 S.W.2d at 582 (citations omitted) (emphasis added). Thus, the court of appeals began with the presumption that Lindsey's statements were unreliable and inadmissible and proceeded to analyze whether adequate indicia of reliability existed to rebut that presumption and to warrant the admission of the statements as required by the Court in *Roberts*. *See Roberts*, 448 U.S. at 66.

In particular, the court of appeals focused on the fact that

Bullock's own statement was consistent with Lindsey's statements with respect to the elements of the drug charges against Bullock. *Bullock,* 982 S.W.2d at 582-83. Citing to *Cruz v. New York*, 481 U.S. 186, 192-93 (1987), the court of appeals stated that reliability is shown when a defendant's own statement confirms the essential facts of a co-defendant's statement. *Bullock,* 982 S.W.2d at 582. In *Cruz,* the Court acknowledged that when an accomplice's confession "confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Cruz*, 481 U.S. at 192.

Indeed, Bullock's statement to the police is entirely consistent with Lindsey's statements regarding the elements of the charges brought against Bullock. Bullock admitted in his statement to the police that he intended to meet Hurtado on March 1, 1995, to purchase 10 kilograms of cocaine. He further stated that when he met with Hurtado, only two kilograms were delivered. He stated that he did not have any money with him in order to pay for the cocaine and when Hurtado discovered this he became angry and pulled out a gun. Bullock stated that there was a struggle, during which Hurtado was shot and killed, that he took Hurtado's body elsewhere and dumped it, and that the next day he gave Lindsey the cocaine.

The court of appeals properly applied this Court's Confrontation Clause jurisprudence by assuming initially that Lindsey's out-of-court statements were inadmissible and then analyzing whether the statements possessed "particularized guarantees of trustworthiness" to justify their admission as required by *Roberts*. *Roberts*, 448 U.S. at 66. The *Roberts* test was satisfied and the inherent trustworthiness of Lindsey's

statements was evidenced by the fact that Bullock's own statement to the police was entirely consistent, in relevant part, with Lindsey's statements. Bullock's real argument is not that the court of appeals applied the wrong legal standard, but that he believes the court reached the wrong result in applying that standard to the facts before it.

But, even if the court of appeals erred in admitting Lindsey's statements, this case is a poor vehicle for the Court to elaborate on its Confrontation Clause jurisprudence because any error was harmless beyond a reasonable doubt. As explained above, Lindsey and Bullock's statements were entirely consistent with respect to the facts relevant to the drug possession charges brought against Bullock. Consequently, Bullock's own statement was sufficient evidence to support his conviction for possession with intent to deliver, and Lindsey's statements were, largely, cumulative.

## CONCLUSION

The court of appeals properly applied this Court's Confrontation Clause jurisprudence in determining that the admission of Lindsey's confessions was appropriate. Bullock's true disagreement with the court of appeals's opinion concerns its interpretation of the facts, not its rendition or interpretation of the law. For the reasons stated, Respondent respectfully requests that Bullock's petition for writ of certiorari be denied.

Respectfully submitted,

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